IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

NO. [redacted] 20

WILLIAM F. ESENWEIN, Petitioner,

v.

COMMONWEALTH ex rel. MAY H. ESENWEIN.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Pennsylvania.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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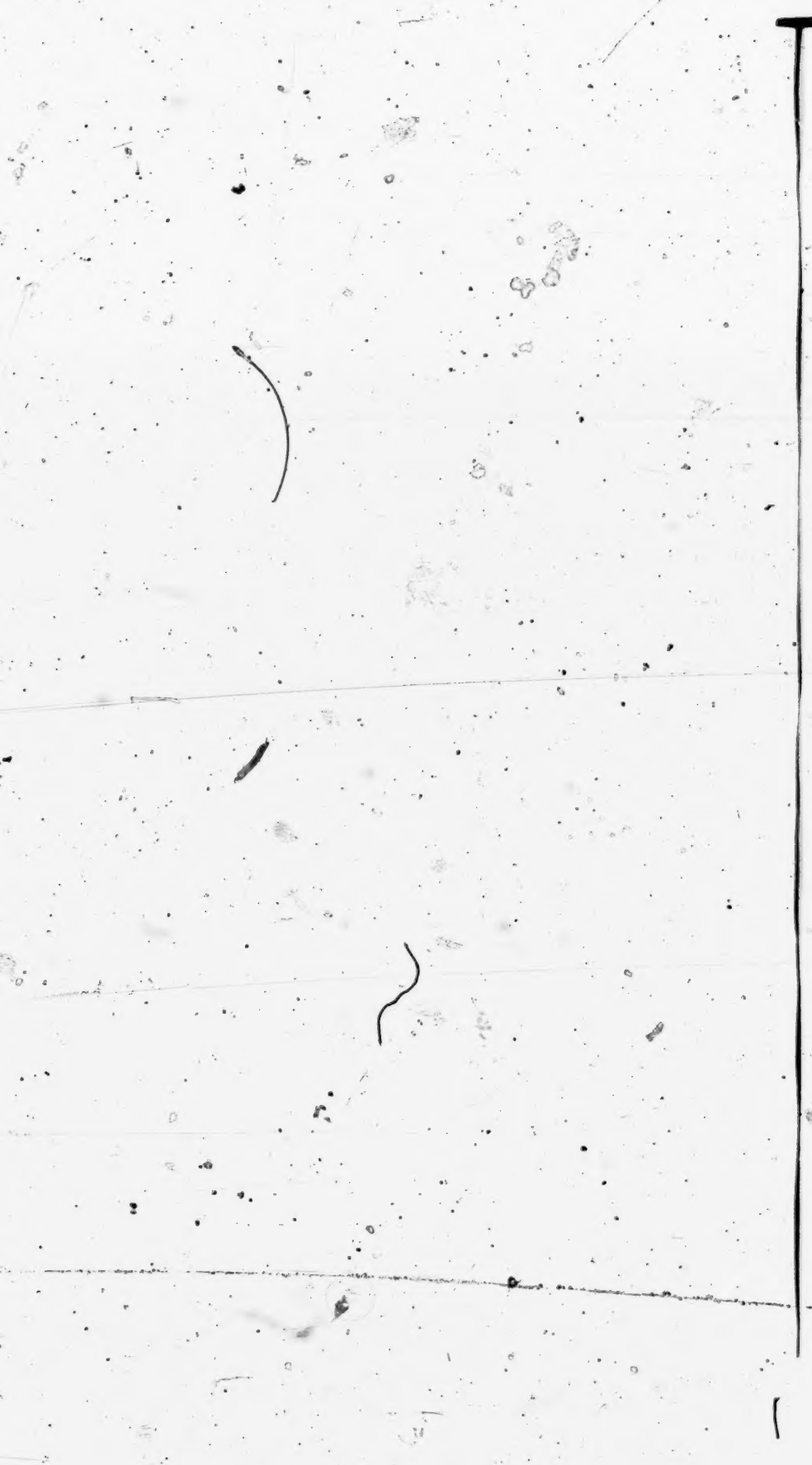

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

NO. 668.

WILLIAM F. ESENWEIN, Petitioner,

v.

COMMONWEALTH ex rel. MAY H. ESENWEIN.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Pennsylvania.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS IN COURT BELOW.

The Opinion of Judge Gunther of the County Court of Allegheny County, Pennsylvania appears on page 49, Transcript of Record filed by Petitioner in this Court. The Opinion of Judge Kenworthey (R. 51) of the Superior Court of Pennsylvania, is reported in Vol. 153 Pa. Super. Crt. 69; 33 A. 2nd 675. The majority (R. 59) and the minority (R. 63) Opinions of the Supreme Court of Pennsylvania are reported, 349 Pa. 451 (1944); 35 A. 2d 335.

JURISDICTION.

The judgment sought to be reviewed was entered January 3rd, 1944 (R. 59; 62). The petition for certiorari was filed in this Court on February 3rd, 1944. The jurisdiction of this Court is invoked under 28 U.S.C.A. §344(b), Judicial Code §237(b), as amended.

QUESTIONS PRESENTED.

1. Whether petitioner was deprived of any rights under Article IV, Section 1, of the Federal Constitution.

2. Whether the Decision in the case of Williams v. North Carolina, 317 U.S. 287; 63 S. Ct. 207, in overruling Haddock v. Haddock, 201 U.S. 562, laid down any new rule of law prohibiting an inquiry by the Court of the matrimonial domicile, into the jurisdiction of the foreign Court (Nevada) which rendered a decree in divorce.

3. Whether the Decision in the case of Williams v. North Carolina, (supra), in overruling Haddock v. Haddock (supra), has any relevancy to the case at bar.

STATEMENT.

Petitioner and respondent were married November 22nd, 1899 in Pennsylvania. In November, 1919, Petitioner left his wife and has not lived with her at any time thereafter. After Petitioner's two unsuccessful attempts to obtain a divorce in Pennsylvania,—(reported and referred to in Vol. 141 Pa. Super Crt. 604—, Petitioner then went to Las Vegas, Nevada in June 1941 (R. 43), and after the precise minimum of residence there required of six weeks, filed an action in divorce against Respondent (R. 11). Proof of Service upon Respondent at Pittsburgh, Pennsylvania, the matrimonial domicile, appears, (R. 16). The Nevada proceedings in full, appear in the Record, (R. 11 to R. 26 inclusive). The wife did not appear. A decree in divorce was granted in Nevada September 8th, 1941, (R. 18).

In 1922 Respondent obtained a support order in the County Court of Allegheny County, Pennsylvania (R. 1), which was modified from time to time until the final order of December 8th, 1942, (R. 9). A Petition for Revocation of the Order of Support was filed in said County Court on February 1st, 1943, (R. 10). The Answer to said Petition appears (R. 27), averring (inter alia), fraud.

After hearing, this Petition for Revocation was refused, (R. 48). On appeal by petitioner to the Superior Court of Pennsylvania, the Order of the County Court was affirmed, (R. 56), on July 16th, 1943; 153 Pa. Super. Crt. 69; 33 A. 2nd 675, Opinion by Judge KENWORTHEY, (R. 51). On appeal to the Supreme Court of Pennsylvania, allowed (R. 57), the order of the Superior Court

was affirmed (R. 62); Opinion by Justice LINN, filed January 3rd, 1944, (R. 59). A dissenting Opinion by Justice DREW, joined by Mr. Chief Justice Maxey was filed January 3rd, 1944, (R. 63).

At the original hearing in County Court, Respondent in support of her averment of fraud, read into the record, for comparison, a portion of the Nevada testimony by Petitioner given September 8th, 1941, as to his alleged intention to make Clark County, Nevada, his "permanent place of residence," (R. 43); and Respondent also read into the record testimony from a deposition previously given by Petitioner in a prior proceeding related to the matter of support, showing that Petitioner did not in fact make Clark County, Nevada, his "permanent place of residence," (R. 42), but was a resident of Cleveland, Ohio since some time in October, 1941 (R. 42). The date is fixed by Petitioner himself as "on or about October 18th, 1941." (R. 6, par 7th). Petitioner's counsel, in reply to a specific question by President Judge KELLER in the Superior Court at time of argument, stated that it could be assumed that "he (Petitioner) left Nevada immediately after obtaining his divorce," (R. 55). Respondent contended that the *animus manendi* was lacking and that therefore Nevada had no jurisdiction for want of bona fide domicile. Both the appellate Courts so found, (R. 55; R. 61).

ARGUMENT.

I. Article IV, Section 1.

The Petitioner was deprived of no right under Article IV, Section 1, of the Federal Constitution. This provision does not, and did not in the instant case, prevent inquiry into the jurisdiction of the Nevada Court:

> "*Neither the constitutional provision* that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State,—(nor the Act of Congress passed in pursuance thereof), *prevents an inquiry* into the jurisdiction of the Court by which a judgment offered in evidence was rendered." (Italics ours).

Thompson v. Whitman, 18 Wallace, 457; 462, 463 (1873);
Bell v. Bell, 181 U.S. 175; 21 S. Ct. 551 (1901);
Andrews v. Andrews, 188 U.S. 14; 23 S. Ct. 237 (1903).

The right of the Petitioner to claim the benefit of the full faith and credit clause (Art. IV, Sec. 1) for the Nevada decree in Pennsylvania, hinged directly upon whether or not (notwithstanding said constitutional provision), the jurisdiction of the Nevada Court could still be challenged by inquiry as to whether or not bona fide domicile in Nevada existed.

Said jurisdiction could be so challenged; *Thompson v. Whitman, supra.* As Justice LINN has said, "There is no doubt of the power of the Courts below to inquire into the jurisdictional facts necessary to confer jurisdiction on the Nevada Court; *Bell v. Bell*, 181 U.S. 175;

Streitwolf v. Streitwolf, 181 U.S. 179; *Andrews v. Andrews*, 188 U.S. 14", etc., (R. 60).

If, based on the *fact* of *lack* of the *animus manendi*, —the lack of real, honest intention to establish a bona fide domicile in Nevada, we come to the conclusion of law (*Dorrance's Estate*, 309 Pa. 151 at page 156; 163 At. p. 304) that Nevada had no jurisdiction, then it follows as a legal conclusion that the Nevada decree "is entitled to NO FAITH and CREDIT" in Pennsylvania. For, where, for instance, the husband was NOT a bona fide resident of Pennsylvania, it was held that:

> "A decree of divorce obtained in the State of Pennsylvania in which neither party is domiciled, upon service by publication, and *in another state*, is *entitled to no faith and credit in that state*." (Italics ours)
>
> *Bell v. Bell*, 181 U. S. 175; 21 S. Ct. 551 (1901); *Andrews v. Andrews*, 188 U. S. 14; 23 S. Ct. 237 (1903).

Judging Petitioner by his *acts* and conduct as against his mere words (*Dorrance's Estate*, 309 Pa. 151; 156, 165, 167, 170; 163 A. 303; *Graham v. Dempsey*, 169 Pa. 460, 462; *Clayton v. Lienhard*, 312 Pa. p. 436; *Holt v. Hendee*, 248 Ill. 288, 296; *Dalrymple's Estate*, 215 Pa. 367, p. 371 (quoting Jacobs on Domicile), he, Petitioner, did *not* have the *animus manendi* required as a vital element; he did *not* intend to establish a bona fide domicile in Nevada.

"He did not establish a bona fide domicile," (Judge KENWORTHEY, R. 55). "He had no intention of making his domicile in Nevada," (Justice LINN, R. 61). There

existed no scientific device for looking into Petitioner's mind and thought processes to ascertain his real intention as he testified in Nevada on September 8th, 1941. We are therefore compelled to judge a person's real intentions by his acts rather than by mere words, *Dorrance's Estate*, 309 Pa. 151; 163 A. 303; there is no other way, (R. 55, Mid.). The rule in *Dorrance's Estate, supra*, is realistic, and saves us from being victimized by any pattern of legal, formal ritualism, (R. 43) where subsequent conduct belies the sincerity of words spoken even under oath, (R. 42; R. 22).

The State of Pennsylvania has established her own test of domicile in *Dorrance's Estate*, 309 Pa. 151; 163 At. 303; and she has lawfully applied her own rule as enunciated in said *Dorrance's Estate, supra*, (R. 55, mid, page). The State of Pennsylvania has the "supreme power to interpret and declare the written and unwritten laws of the State"; *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, p. 680; 50 S. Ct. 451. The State of Pennsylvania's Courts have found as a fact on the record testimony (R. 42, 43) that petitioner did not intend to, nor did he establish, a bona fide domicile in Nevada, (R. 55; R. 61). This finding of fact was exclusively in the Pennsylvania Courts; * * * "its interpretation was in the Illinois Courts and not here; *Drivers Union v. Meadowmoor Co.*, 312 U.S. 287, p. 294; 61 S. Ct. 552.

If Petitioner's sudden change of mind from the moment he testified in Nevada on September 8th, 1941 (R. 22; 43) had been compelled by some legitimate reason, by some unforeseen circumstances, he should have appeared and given such testimony, (if any he had), in the County Court below, as was so sharply pointed out by

Justice LINN, (R. 61). Prof. Lorenzon points out the identical observation, in principle, in his able analysis of *Haddock v. Haddock* and *Williams v. North Carolina, supra,* Vol. 52 Yale Law Journal, at page 353. In the same publication and page, Prof. Lorenzon comments:—

> "If it appears from the facts that the petitioner *left the State shortly after the decree of divorce* was granted, a presumption might well be created that no bona fide intention to establish a permanent home existed". (Italics ours)

Petitioner cannot *escape* the lack of Nevada jurisdiction by hiding behind the full faith and credit clause (Art. IV, Sec. 1). He cannot be heard to protest against the exposure of his own fraud and *mala fides*—(called, "a sham and fraud" by Justice LINN, R. 61)—and at the same time demand protection under the full faith and credit provision, (Art. IV, Sec. 1). This insistence by Petitioner on Article IV, Section 1, is simply another way of insisting that the *mere existence* of that Constitutional provision, *ipso facto*, and automatically *bars inquiry* into the question of the Nevada Court's jurisdiction in this case.

This position is unsound; *Thompson v. Whitman*, 18 Wallace 457; 462, 463. (1873)

Article IV, Section 1, *supra*, was not intended as a refuge for those who practice *mala fides* and fraud upon the laws of the State of their domicile,—(here Pennsylvania). The case of *Andrews v. Andrews*, 188 U.S. 14 (1902), held that the Courts of Massachusetts were,—

> • • • "not obliged to enforce a decree in divorce, obtained in another state, as to persons domiciled in

Massachusetts and who go into such other State *with the purpose of practising a fraud* upon the laws of the State of their domicile, that is, to *procure a divorce without obtaining a bona fide domicile in such other State*". (Italics ours)

The lack of the *animus manendi* was fatal to Navada jurisdiction. It followed as a conclusion of law, based upon undisputed facts; *Dorrance's Estate*, 309 Pa. 151 at page 156; 163 At. at p. 304;—(R. 42-43; R. 55 nr. top); *Halpine v. Halpine*, 52 Pa. Super. Crt. 80, p. 86; *Dulin v. Dulin*, 33 Pa. Super Crt. 4, p. 5; *Harrison v. Harrison*, 69 Pa. Super. Crt. p. 582.

There being no *animus manendi*, and thus, no jurisdiction in the Nevada Court, there arises no question of any extension of the full faith and credit clause to the decree rendered under such circumstances. The Nevada decree (R. 18) was entitled to no faith and credit in Pennsylvania; *Bell v. Bell*, 181 U.S. 175; 21 S. Ct. 551. There is therefore no Federal question or questions involving the application or construction of Article IV, Section 1, or of any other provision of the Constitution of the United States.

II. The Decision in Williams v. North Carolina, 317 U.S. 287; 63 S. Ct. 207.

On page 3 (bottom), and on page 7 of his Petition for Writ of Certiorari, the Petitioner speaks of a new rule of law "as announced in Williams v. North Carolina", and claims that this new rule has "definitely shattered" *Bell v. Bell*, 181 U.S. 175, *Streitwolf v. Streitwolf*, 181 U.S. 179 and *Andrews v. Andrews*, 188 U.S. 14 "as

present day authorities". There is no reasoning or argument for this proposition whatever.

Petitioner, in the Courts below, has never been specific, has never defined the alleged new rule supposed to have been established by the Decision in Williams v. North Carolina, but has implied, without undertaking to so state, that the Decision in said case of *Williams v. North Carolina*, in overruling *Haddock v. Haddock*, (201 U.S. 562), has laid down a new rule of law *prohibiting an inquiry* by the Court of the matrimonial domicile, into the jurisdiction of the foreign Court (Nevada), which renders a decree in divorce. This was Petitioner's position in the appellate Courts below.

Respondent contradicted this position and pointed out that in the case of Williams v. North Carolina, *supra*, the *fact* of bona fide domicile *was admitted* by the State of North Carolina; and it was *not* found either as a fact or as a matter of law, by the Supreme Court of the United States: *Williams v. North Carolina*, 317 U.S. 287; page 302, cited verbatim by Justice LINN, (R. 62), especially, where his Honor Mr. Justice Douglas says:—

> "Nor do we reach here the question as to the power of North Carolina to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada Court, North Carolina finds that no *bona fide* domicile was acquired in Nevada".

The question of bona fide domicile of libellants in the Williams case did not arise, and was not considered nor decided in Mr. Justice Douglas's Opinion of the majority; Prof. Lorenzon in 52 Yale Law Journal, at page 344 (March, 1943)—"The issue of domicile was not before the Court"; *Estate of Bingham*, 265 N.Y. State App. Div. 463, p. 466; *Matter of Holmes*, 291 N.Y., pg. 284;—

"The Williams case is not controlling * * * the majority opinion rested upon the admission of the North Carolina Attorney-General that 'there probably is enough evidence in the record to require that petitioners be considered to have been actually domiciled in Nevada' "; to the same effect, Mr. Justice DOUGLAS in the majority Opinion, *Williams v. North Carolina*, 317 U.S. at page 291: "Moreover it (North Carolina) admits that there is probably enough evidence in the record that petitioners be considered 'to have been actually domiciled in Nevada' ".

Overruling Haddock v. Haddock (supra), thus holding substituted service good in North Carolina, cannot affect the case at bar. Such service was predicated upon an admitted bona fide domicile in Nevada (in the Williams case). Jurisdiction was *admitted* in the Williams case. It is precisely the Nevada jurisdiction which is lacking in the case at bar, and which is attacked and certainly not admitted. The jurisdiction is the first consideration,—the service must rest on that foundation. Without jurisdiction to begin with, we never arrive at any question of service,—we never get that far. Whether Haddock v. Haddock was or was not overruled in the Williams case has no relevancy under the facts in the present case,—it is immaterial because of the initial failure of the Nevada jurisdiction in the case at bar.

Williams v. North Carolina granted no immunity against the firmly established legal right to challenge the jurisdiction of the foreign (Nevada) Court. There still remains the freedom to inquire into the jurisdiction *same as before the Decision in the Williams case.* "He (Mr. Justice DOUGLAS) painstakingly pointed out that the Court was not overruling Bell v. Bell", (Judge KENWORTHEY, R. 53, nr. top). The statement of Petitioner

on page 7 of his Petition for Certiorari, that the Williams case has "definitely shattered" Bell v. Bell, is a mere naked and unsupported allegation, and is in error.

Bona fide domicile is a jurisdictional fact; its existence is subject to challenge. *The Decision in Williams v. North Carolina has not changed this rule.* Only if a plaintiff in divorce actually acquires a bona fide domicile in the State granting the decree, is that decree entitled to full faith and credit; the authority of Bell v. Bell has not been impaired, (R. 52); (R. 53).

The "division of opinion which existed among the six Justices of the Supreme Court of Pennsylvania" (cited page 4, Petition for Certiorari), did not arise by virtue of the Decision in the case of Williams v. North Carolina, *supra,* nor of anything thereto related, but arose solely on the *factual* question of the *intention* of the Petitioner to establish a bona fide domicile in Nevada, or, as the testimony puts it, "of making Clark County, Nevada your permanent place of residence", (R. 43). Applying the rule in the Pennsylvania case of *Dorrance's Estate*, 309 Pa. 151, 156; 163 A. 303, p. 304, to the admitted and undisputed facts, *i.e.*, to the conduct of Petitioner in departing from Nevada, to which he has not to date returned, promptly on obtaining his Nevada decree, the appellate Courts below concluded, as a matter of law, that the *animus manendi* was lacking; and that Petitioner "had no intention of making his domicile in Nevada", (R. 61).

> "The determination of decedent's domicile in this appeal is a conclusion of law based upon facts, most of which are undisputed".
>
> *Dorrance's Estate*, 309 Pa. at page 156; 163 A. p. 304; (R. 55, mid.).

No Federal or Constitutional question was involved, nor any difference of interpretation of Williams v. North Carolina in said division of opinion.

As to the case of *Holmes Estate*, 291 N.Y. 261; 59 N.E. 2d 424, cited on page 4, Petition for Certiorari, (R. 67), the facts are not analogous. The majority opinion in that case omits the crucial element in the Williams v. North Carolina case, to-wit, the *admission* by North Carolina of domicile of libellants in Nevada, which vital point is referred to in the minority opinion *in five (5) distinct quotes* from the Opinion of Mr. Justice DOUGLAS, set forth in said *Holmes Estate*, 291 N.Y. at pages 281, 282.

The Nevada jurisdiction, which was *admitted* in the Williams case, was not merely "assumed" as stated in the majority opinion in *Holmes Estate*, 291 N.Y. at page 268. In Holmes Estate, *supra*, there was no challenge, in the Agreed Statement of Facts (R. 68) to the domicile of libellant in Nevada; contra, in the Esenwein case at bar, the Nevada jurisdiction *is* challenged, (R. 42-43; R. 55 nr. top).

The grounds of the dissenting opinion (In Re Holmes Estate, supra), relate in no way to the Decision in Williams v. North Carolina, but solely to the item of *fact*, that the *Agreed Statement of Facts* in that case *"nowhere * * * claimed * * * that he was * * * domiciled in Nevada"*. "We stress this because *it goes to the foundation of our disagreement*," *Matter of Holmes*, 291 N.Y. 261, at p. 279.

As to the objection stated in the minority Opinion at bar (R. 69), that "appellee has failed to adduce any

affirmative proof", etc., we respectfully wish to observe that jurisdiction is always open to collateral attack and may be based solely upon the face of the proceedings of the foreign Court, *without resorting to extrinsic proof, i.e.*, from an inspection of the record itself, (R. 42-43; *Dorrance's Estate*, 309 Pa. 151, 156; 163 At. p. 304).

O'Donoghue v. Boies, 159 N.Y. p. 99; 53 N.E. 537;

Matter of Holmes, 291 N.Y. at p. 287.

In the case of *Stephens v. Stephens*, Ill. App. Div. 49 N.E. 2d 560, (cited page 4, Petition for Certiorari), the question of *bona fide residence in Nevada* came up on appeal. The majority opinion did not consider this issue. The minority opinion did, and it held—(as Mr. Justice DOUGLAS held)—that *Williams v. North Carolina*, 317 U.S. 287; 63 S. Ct. 207, does not overrule Bell v. Bell.—(R. 53, *idem*).

Conclusion.

1. Petitioner having acquired no bona fide domicile in Nevada, the Nevada decree is entitled to no faith or credit in Pennsylvania, under Art. IV, Section 1, of the Federal Constitution. Petitioner has therefore been deprived of no rights under said Federal provision.

2. The Opinion of Mr. Justice DOUGLAS in Williams v. North Carolina, supra, is clear and definite (see R. 62, quote by Justice LINN), and needs no further re-consideration, amplification, interpretation, re-statement or reiteration by this Court, either on the instant Petition for Certiorari or otherwise.

3. The judgment of the Court below is not inconsistent with the Decision in Williams v. North Carolina;

"Our conclusion is not inconsistent with the decision in *Williams v. North Carolina*, 317 U.S. 287." (R. 62, Justice LINN).

4. The Decision in the case of Williams v. North Carolina, in overruling Haddock v. Haddock, has no relevancy to the facts in the case at bar.

Respectfully submitted,

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